

Letter Ruling 15-1: Sales/Use Tax on Sale and Installation of a Ski Lift

January 20, 2015

I. INTRODUCTION

You request a letter ruling regarding the Massachusetts sales/use tax treatment under G.L. c. 64H, of a contract involving the sale and the installation of a ski lift in Massachusetts by your client, a corporation located in the State of ****. Specifically, you ask whether a contract for the installation of a ski lift under the facts set forth below is a construction contract subject to the Massachusetts sales tax rules governing construction contractors, or alternatively, whether the contract is a contract for the sale of tangible personal property. You state the facts as follows:

II. FACTS

***** ("Corporation"), has entered into a lump sum contract to furnish and install a ski lift to a buyer located in Massachusetts ("Buyer"). Corporation is also identified as the "Seller" in both of the agreements described below. ***** ("Manufacturer"), is the manufacturer of the lift components. ***** ("Engineering Companies") provide engineering services in connection with the lifts. All of these entities are located in **** and share some common ownership with the Corporation.

The contract between the Seller and Buyer consists of two separately-executed agreements. The first agreement, designated as a "Passenger Ropeway Equipment Supply and Installation Agreement", ("Supply and Installation Agreement") includes six exhibits and written addenda issued subsequent to the execution of the agreement. The second agreement, designated as an "Engineering Agreement," is incorporated by reference into the Supply and Installation Agreement. Both agreements collectively comprise "the Contract" between the parties.

Pursuant to Section 2 (Seller's duties and obligations) of the Supply and Installation Agreement, Corporation is required to provide the manufacturing and installation work in conformance with the site plan specifications. Under the terms of this provision, Corporation must also "provide labor, supplies and materials to supply and install the lift in conformance with the Contract". Exhibits to the contract detail supplies and materials to be furnished by Corporation. Corporation also must warrant that the work performed under the contract shall conform with the "American National Standards Institute Safety Code B77 for Passenger Ropeways – Aerial Tramways, Aerial Lifts, Surface Lifts, Tows and Conveyors- Safety Requirements."

Pursuant to Section 4 (The Site), the lift must be engineered for erection at the site. The Buyer must provide the necessary services, access, and storage areas at the site required for supply and erection. The purchase price allocation in the Contract includes all subcontracted work, materials, and installation labor performed at Buyer's Massachusetts location. The total purchase price for equipment and installation, as provided by Exhibit 6 of the Supply and Installation Agreement, is *****. Exhibit 2 of the Engineering Agreement provides for an additional ***** payment for engineering services. Under Section 6 of the Supply and Installation Agreement, "[u]ntil such time as all financial or payment obligations of the Buyer have been fulfilled under the contract, the lift shall be and remain personal property and shall not be deemed to be real property even though affixed or attached thereto, whether or not placed on a permanent foundation."

Corporation's responsibilities also include, but are not limited to:

- Excavation and installation of concrete foundations for towers and terminals;
- Installation of communication/control cables, electrical controls, batteries and chargers, motor controller and motor, APU, loading conveyor, towers, terminals and machinery.

Buyer agrees that it will not operate the lift, except for testing, until the contract is paid in full unless given express permission by Corporation to extend final payments. The final payment, which is about 30% of the total price of the contract, is not due until the completion of the contract. Buyer does not take possession of the lift until the construction has been substantially completed.

The ski lift components are designed and manufactured in ****. Each lift is custom engineered using standardized components common to all lifts to meet the specifications of the customer for their location. The ski lift has a span of 3,011 feet with a vertical rise of 928 feet. It consists of 15 towers and a terminal that is affixed to concrete pads with bolts. The entire lift can be removed for relocation at a cost of approximately \$100,000, and would take about 7-14 days to remove from the existing site.

Concrete foundations are installed for the towers and terminals, so parts of the lift are bolted to embed concrete support foundations. In some cases, the concrete foundations are already in place and the ski lift is bolted to these existing concrete foundations. A control house (optional) sits on 8"x8" pipe which is buried 4' below ground.

III. ISSUE

Is the Corporation's contract to furnish and install a ski lift under the facts described above a construction contract or a contract for the sale and installation of tangible personal property for Massachusetts sales and use tax purposes?

IV. RULING

For reasons discussed below, we conclude that the contract to furnish and install the ski lift, as described by Corporation, is a construction contract. We further rule that Corporation is acting as a construction contractor with respect to its agreement to

furnish and install the ski lift.^[11] As such, Corporation must pay tax on the sales price of all tangible personal property it purchases in fulfillment of its contract. Finally, we conclude that the ski lift as described is not "a complete unit of standard equipment requiring no further fabrication but simply installation, assembling, applying, or connecting services", and therefore the contract is not transformed into one for the sale of tangible personal property on that basis.

V. DISCUSSION

Massachusetts General Laws chapter 64H, § 2 imposes an excise upon sales at retail of tangible personal property in the Commonwealth by any vendor at the rate of 6.25% of the gross receipts of the vendor from all sales of such property, except as otherwise provided in chapter 64H. The "sales price" subject to tax includes the total amount paid by purchaser to a vendor as consideration for a retail sale, valued in money or otherwise. Included in the sales price is any amount paid for any services that are part of the sale. G.L. c. 64H, § 1. A complementary use tax is imposed upon every person storing, using or otherwise consuming in the Commonwealth tangible personal property or telecommunications services purchased from a vendor, or manufactured, fabricated, or assembled from materials acquired either within or outside the Commonwealth for storage, use, or other consumption within the Commonwealth at the rate of 6.25% of the sales price of the property or services, except as otherwise provided in chapter 64I. G.L. c. 64I, § 2.

The Commissioner has not issued a public written statement governing the sales tax treatment of contracts for the sale and/or installation of a ski lift. Analysis of this issue requires a fact-intensive examination of the entire transaction and agreement between a seller and its customer to determine whether it is a construction contract, or alternatively, whether it is a contract for the sale of tangible personal property.

A "construction contract" has been defined as "a contract for the construction, reconstruction, alternation, improvement, remodeling or repair of real property. In Massachusetts, it is well-settled that "construction contracts. . . are not contracts for the sale of goods. . . . [Such] contracts . . . [are] not contracts for the sale of bricks or window frames or caulking material but contracts for the construction and sale of building." *Classic Kitchens, Inc., v. Commissioner of Revenue*, A.T.B. Docket No. C262393 (2004), citing *White v. Peabody Construction Co., Inc.*, 386 Mass. 121, 132-133 (1982).

The general rule for contractors and subcontractors who construct, reconstruct, alter, improve and remodel and repair real property is that the contractor is the consumer of tangible personal property purchased by them for the performance of their contracts ("the contractor rule"). The sales contractor rules were originally published in Emergency Regulation No. 12 in 1966.

Emergency Regulation 12 lapsed without promulgation and therefore does not have the full force of law. (*See e.g.*, Letter Ruling 88-8). Nevertheless, the Commissioner and various Massachusetts authorities have recognized Emergency Regulation No. 12 as a contemporaneous interpretation of the sales tax statute which is entitled to deference. *See e.g.*, *Classic Kitchens, Inc., v. Commissioner of Revenue*, *supra*, *Ace Heating Service, Inc. v. State Tax Commission*, 371 Mass. 254, 256 (1976); *PPC Constructors v. Commissioner of Revenue*, A.T.B. Docket No. F251047 (2001);

Lawrence-Lynch Corp. v. Commissioner of Revenue, 22 Mass. App. Tax Bd. Rep. 245, 254 (1997); DOR Directive 14-2; Letter Rulings 88-8 (as modified by DOR Directive 14-2); 86-4. Unless the exception discussed below applies, such contractors must pay sales or use tax to their suppliers on purchases of tangible personal property to be used in their business. *PPC Constructors* at 320.

There is an exception to the "contractor rule" described above. The general sales tax rule for construction contractors does not apply to sales in which contractors act as retailers selling tangible personal property in the same manner as other retailers, and install a complete unit of standard equipment requiring no further fabrication but simply installation, assembling, applying or connecting services. Persons acting as retailers of tangible personal property are not construction contractors and must collect tax on the sales price of the item from the buyer.

The Commissioner has not ruled previously on the issue of whether a ski lift is a "complete unit of standard equipment, requiring no further fabrication other than installing, applying or connecting services" such that it would come within the exception to the "contractor rule". Examples of complete units of standard equipment include water softeners to be affixed to real property, (Letter Ruling 85-25); wireless alarm systems to be affixed to real property, (Letter Ruling 85-68); HVAC Equipment (Letter Ruling 82-45); and awnings or blinds and electrical fixtures to be installed.

Various Massachusetts authorities have analyzed contracts involving construction contractors that provide tangible personal property in connection with their contracts with their customers. See, e.g., *The Anthony Galluzzo Corporation v. Commissioner of Revenue*, A.T.B. Docket No. 195606 (1997); *Classic Kitchens, Inc. v. Commissioner of Revenue*, *supra*; *PPC Constructors v. Commissioner of Revenue*, *supra*.

In *Galluzzo*, The Anthony Galluzzo Corporation supplied construction materials and fabricated custom-made millwork in its New Hampshire facility, which included preliminary fabrication of purchased materials. All such work was performed by the corporation in its New Hampshire facility. Galluzzo entered into contracts with Massachusetts general contractors and performed two kinds of contracts. The first type was a "furnish only" contract, where Galluzzo merely supplied the required items. The second type was a "furnish and install" contract, where the corporation not only supplied the required items but was also required to install them. The corporation subcontracted out the installation portion of the contract to an unrelated Massachusetts corporation. The Appellate Tax Board found that the delivery of items by the corporation to the general contractors in Massachusetts pursuant to the "furnish only" contracts constituted sales of tangible personal property subject to Massachusetts sales tax under G.L. c. 64H, § 2. The Board further found that pursuant to its "furnish and install" contracts, *Galluzzo* was acting as a contractor. Accordingly, as the ultimate consumer of the materials purchased in fulfilling those contracts, it was liable for the Massachusetts use tax on the items it purchased for use in those contracts.

In *Classic Kitchens, Inc.*, the Appellate Tax Board applied the contractor rule in the context of kitchen cabinets. In that case, the taxpayer specialized in the construction and remodeling of kitchens. It charged its customers on a lump sum

basis and did not collect or remit sales tax on those charges. In the course of its business, it purchased partially finished cabinets and countertops and paid a sales tax to the vendors of those items. Under the facts presented, the Board held that the corporation was a construction contractor, concluding that the corporation did not sell kitchen cabinets and countertops to its customers, but rather sold construction services to design and build a remodeled kitchen. In DD 14-2, the Department clarified that a commercial manufacturer or fabricator of cabinets generally may not use "the contractor rule" to pay tax on materials only, and may not be designated a subcontractor of the purchaser, even if the purchaser qualifies for treatment as a home improvement contractor.

In *PPC Constructors, Inc.*, the Board found that the taxpayer, PPC Constructors, Inc. a mechanical engineering firm in the business of providing both consulting services and design and installation of mechanical systems for its customer's businesses, was acting as a construction contractor, and not a vendor of tangible personal property, with respect to five contracts it performed for various customers. PPC Constructors ordered materials from various vendors, pursuant to its customers' specifications, and in most instances had these materials shipped directly to its customers. In determining the sales tax treatment of PPC's purchases of materials used in the performance of the five contracts at issue, the Board stated that "a contractor must pay the sales tax as a consumer upon the purchase of all materials and supplies used by it in fulfilling a lump sum contract, a cost-plus contract, or a time and materials contract with an upset or guaranteed price which may not be exceeded." *Id.* at 320.

The Board noted that like the taxpayer in *Galluzzo*, PPC Constructors did not maintain a warehouse for storage of items, or an inventory of items for use in its contracts with Massachusetts customers. Moreover, the Board noted that the PPC Constructors contracts involved the "highly specialized" construction of items such as water filtration, heating, fuel and hydroponic systems, that would substantially change the real estate. The Board found that these contracts for custom-made improvements to real property were not for the sale of tangible personal property but rather were construction contracts.

VI. CONCLUSION

Based on the facts as you state them, as well as the authorities discussed in this ruling, we find that Corporation, pursuant to its "furnish and install" lump sum contract, is engaged in the performance of a construction contract with respect to the erection and installation of a ski lift for its Massachusetts customer. We further find that the contract is not merely one for the sale of tangible personal property requiring only installation, assembling, applying or connecting services. The ski lift as described is a not complete unit or standard item of tangible personal property which requires no further fabrication other than installing, applying or connecting services. Rather, Corporation is providing a complete ski lift system subject to specific engineering and other requirements specific to the site and the needs of the Buyer. Viewing the entire transaction as a whole, the Contract involves substantial improvement to real property.

As a contractor, Corporation is the consumer of the tangible personal property it purchases pursuant to its agreement to furnish and install the ski lift for a lump sum

price. Corporation therefore must pay use tax at the rate of 6.25% on the sales price of the materials it purchases from Manufacturer. The sales price, in this instance, would include labor and services of the Manufacturer to fabricate and manufacture those materials, regardless of whether such charges for labor and services are separately stated.

Very truly yours,

/s/Amy Pitter

Amy Pitter
Commissioner of Revenue

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[\[1\]](#) *Also see* DD 05-3, Deposit and Bonding Requirements for Nonresident Contractors.
